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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LINDSAY KAMAKAHI and JUSTINE
LEVY, individually, and on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

AMERICAN SOCIETY FOR
REPRODUCTIVE MEDICINE and
SOCIETY FOR ASSISTED
REPRODUCTIVE TECHNOLOGY,
Defendants.

Case No. 3:11-CV-1781-JCS

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO EXCLUDE THE
OPINIONS OF DR. HAL J. SINGER ON
CLASS CERTIFICATION; DEFENDANTS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
THEREOF**

DATE: January 23, 2015

TIME: 9:30 a.m.

JUDGE: Honorable Joseph C. Spero

COURTROOM: Courtroom G, 15th Floor
455 Golden Gate Ave.
San Francisco, CA 94102

DOCUMENT SUBMITTED UNDER SEAL

NOTICE OF MOTION AND MOTION

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 23, 2015, at 9:30 a.m., before the Honorable Joseph C. Spero, Magistrate Judge, at the United States Courthouse, Courtroom G, 15th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants will and hereby do move for an Order Excluding the Opinions of Dr. Hal J. Singer on Class Certification. Dr. Singer's initial report was filed under seal on April 25, 2014, and his reply was filed under seal on August 29, 2014. This motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, all of the pleadings and documents on file in this action, and such other matters as may be presented at or before the hearing.

Respectfully submitted,

By: /s/ William L. Monts III

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December 9, 2014

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ISSUE TO BE DECIDED

Should the Court exclude the opinions of Dr. Hal J. Singer under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because they are the products of unreliable methodologies and do not fit with the facts in the record?

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants American Society for Reproductive Medicine (“ASRM”) and Society for Assisted Reproductive Technology (“SART”) (collectively, “Defendants”) submit this memorandum in support to their motion to exclude the opinions of Dr. Hal J. Singer.

INTRODUCTION

This case is a putative antitrust class action brought on behalf of women who have donated eggs for assisted reproductive procedures. Named Plaintiffs’ (“Plaintiffs”) amended complaint alleges that Defendant ASRM, an society of medical professionals performing assisted reproductive procedures, has promulgated an ethics report, *see* “ASRM Ethics Committee Report” entitled Financial Compensation of Oocyte Donors (“Ethics Report”),¹ addressing compensation of egg donors. That Ethics Reports states that donor compensation above \$5,000 requires justification and that compensation above \$10,000 is not appropriate Consolidated Amended Complaint (“Comp.”) ¶¶ 60-63. Plaintiffs also allege that because SART, a professional society of assisted reproductive medical clinics, imposes the compensation provisions of the Ethics Report on its members and obtains the agreement of independent donor agencies to adhere to those provisions as well, ASRM and SART have formed a price-fixing conspiracy that caps compensation for egg donors in violation of section 1 of the Sherman Act. 15 U.S.C. § 1; *see* Comp. ¶¶ 105-09. Plaintiffs have moved for certification of nationwide class of egg donors seeking both injunctive relief and treble damages.

In support of their motion, Plaintiffs have offered the opinions of Dr. Hal J. Singer, an

¹ The Ethics Report is available on the ASRM website at https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/financial_incentives.pdf.

1 expert economist. Dr. Singer offers opinion testimony addressing two issues essential to
 2 Plaintiffs' certification motion: commonality, Fed. R. Civ. P. 23(a)(2), and predominance. *Id.*
 3 23(b)(3). He opines that Plaintiffs can show through common evidence that the compensation
 4 provisions of the Ethics Report have a common impact on all members of the class and that
 5 aggregate class damages may be calculated using common proof. Those opinions rest on two
 6 foundations. *First*, based on data from one clinic and one donor agency in the San Francisco
 7 area, Dr. Singer ran two "illustrative" regression analyses and opines that, if given sufficient data,
 8 he can demonstrate classwide impact from common evidence and calculate aggregate class
 9 damages. *Second*, based on analysis of mostly advertised compensation from various clinics and
 10 donor agencies, Dr. Singer concludes that there is a "rigid pricing structure" for donor
 11 compensation. Those opinions are the cornerstones of Plaintiffs' request for class certification.

12 While Defendants concede that Dr. Singer is qualified to testify as an expert economist,
 13 his opinions in this case must be excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
 14 509 U.S. 579 (1993). Dr. Singer's regressions and "rigid pricing structure" analysis rest on
 15 unreliable methodologies. Moreover, neither squares with undisputed facts in the record.
 16 Accordingly, neither meets the requirements for expert testimony set forth in *Daubert*, and his
 17 opinions based on them are inadmissible.

18 LEGAL STANDARD

19 Under Rule 702 of the Federal Rules of Evidence, expert testimony is admissible if it
 20 "will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert
 21 testimony must rest on "both . . . a reliable foundation" and be "relevant to the task at hand" to
 22 satisfy Rule 702. *Daubert*, 509 U.S. at 597. Expert testimony failing either of those tests must be
 23 excluded.

24 Expert testimony is reliable when "the knowledge underlying [the testimony] has a
 25 reasonable basis in the knowledge and experience of the relevant discipline." *Id.* (citation
 26 omitted). The expert proffering the opinion must put forth a reliable methodology from which the
 27 proffered opinions were derived. Expert testimony is relevant when it "properly can be applied to
 28 the facts in issue." *Id.* at 592-93. In other words, "the knowledge underlying [the testimony] has

1 a valid . . . connection to the pertinent inquiry.” *United States v. Sandoval-Mendoza*, 472 F.3d
 2 645, 654 (9th Cir. 2006) (citation omitted). There must be a “fit” between the proffered
 3 testimony and the facts of the case. *See Daubert v. Merrill Dow Pharms., Inc.* 43 F.3d 1311,
 4 1320 (1995). These standards apply both to scientific and non-scientific expert testimony.
 5 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (noting that “there are many different
 6 kinds of experts, and many different kinds of expertise”).

7 Plaintiffs concede that *Daubert*’s strictures are fully applicable when expert testimony is
 8 offered to support a motion for class certification. *See* Pls. Memorandum of Points and
 9 Authorities in Support of Motion to Strike Class Certification Report of Insoo Hyun (Dkt. #133)
 10 at 2-3. Moreover, as other courts in this district have noted, a *Daubert* inquiry at the class
 11 certification stage serves a particularly useful function:

12 [U]ndertaking a full-blown *Daubert* analysis at the class certification stage makes
 13 a great deal of practical sense. It is well established that courts, in evaluating
 14 whether class certification is appropriate, cannot engage in a so-called “battle of
 15 the experts.” Thus, while courts cannot decide which parties’ evidence is
 16 ultimately more persuasive as to the merits of the case, they must nevertheless
 17 make factual determinations regarding evidence as it relates to the requirements of
 18 FRCP 23. There would be scant, if any benefit to the FRCP 23 inquiry if courts
 19 cannot ensure that competing testimony is relevant, admissible and in fact
 20 proffered by an expert. While the court agrees that the persuasiveness of
 21 competing expert opinions as to liability should be left to the trier of fact, it cannot
 22 conclude that accepting *anyone*’s testimony to establish commonality, typicality or
 23 predominance is the proper way to ensure that FRCP 23’s requirements have been
 24 met.

25 *Pecover v. Elec. Arts, Inc.*, 2010 WL 8742757, at *4 (N.D. Cal. Dec. 21, 2010) (applying *Daubert*
 26 principles to class certification) (emphasis in original); *see also American Honda Motor Co. v.*
 27 *Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (“when an expert’s report is critical to class
 28 certification . . . , a district court must conclusively rule on any challenge to the expert’s

1 qualification or submissions prior to ruling on a class certification motion”) (internal citation
 2 omitted); *cf. In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011)
 3 (concluding that district court did not err “by conducting a focused *Daubert* analysis which
 4 scrutinized the reliability of the expert testimony in light of the criteria for class certification and
 5 the current state of the evidence”). The *Pecover* court’s observations have particular force in this
 6 case because fact discovery is now closed, and the parties have the benefit of a full record to place
 7 before this Court on class certification. In light of these principles and given Plaintiffs’
 8 concession as to their applicability in the class certification context, Dr. Singer’s opinions are not
 9 admissible unless they satisfy *Daubert*.

10 ARGUMENT

11 To understand why Dr. Singer’s opinions are inadmissible, one must first understand what
 12 Plaintiffs’ must prove on their underlying claim and how that fits into the class certification
 13 inquiry. To prevail on an antitrust claim, a private plaintiff must prove injury to her “business or
 14 property.” 15 U.S.C. § 15. Not just any injury will do, however. The injury must be “antitrust
 15 injury,” which is an injury “of the type the antitrust laws were designed to prevent and that flows
 16 from that which makes defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,
 17 429 U.S. 477, 489 (1977). In other words, the injury must correspond to the reason for finding an
 18 antitrust violation. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). The
 19 antitrust injury requirement is an element of a claim whether a private plaintiff seeks monetary or
 20 injunctive relief. *Brunswick*, 429 U.S. at 489 (antitrust injury required in treble damages actions
 21 under section 4 of the Clayton Act, 15 U.S.C. § 15); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479
 22 U.S. 104 (1986) (private plaintiff seeking injunctive relief under Section 16 of the Clayton Act,
 23 15 U.S.C. § 26, must show that it is threatened with antitrust injury). As Dr. Singer conceded, for
 24 any class to be certified, Plaintiffs must show that the “conduct that elevated the prices ended up
 25 touching all of the buyers in the class.” Deposition of Hal J. Singer (“Singer Dep.”) at 108:17-19
 26 (attached as Exhibit 1 to the Declaration of William L. Monts III in Support of Defendants’
 27 Administrative Motion to Seal Portions of Defendants’ Memorandum of Points and Authorities in
 28 Support of Their Motion to Exclude the Opinions of Dr. Hal J. Singer on Class Certification

(“Monts Decl.”)). Plaintiffs must develop a methodology that, with evidence common to the class as a whole, can establish “in one stroke,” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), whether absent class members have suffered or will likely suffer antitrust injury. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (“individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation”); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) (“In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.”); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (“[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.”). On that essential issue, Dr. Singer’s opinions are the only evidence supporting Plaintiffs’ certification motion. Yet they fail both the reliability and relevancy prongs of *Daubert* and are therefore inadmissible to support class certification.

I. DR. SINGER’S REGRESSIONS ARE UNRELIABLE AND DO NOT FIT THE FACTS OF THE CASE.

Dr. Singer’s regressions are the linchpin of his opinions, but they fail both prongs of the *Daubert* inquiry. *First*, Dr. Singer’s regressions are unreliable for determining common impact on a putative nationwide class. Dr. Singer admits that his analysis is illustrative and applies only to Fertility Connections, a donor agency in the San Francisco area, and not to any other clinic or agency. Thus, even assuming that the regressions are properly specified, they cannot determine whether the challenged Ethics Report had an impact on any absent class member donating at any other agency or clinic in the United States. *Second*, Dr. Singer’s regression models are not relevant because they are built on assumptions that contradict the undisputed facts in the case. In designing his models, Dr. Singer has assumed that for a period of time Fertility Connections did not comply with the challenged Ethics Report. But the un rebutted testimony of Sherri Barr, the agency’s principal, establishes that Fertility Connections never believed that it was out of

1 compliance with the compensation provisions of the Ethics Report or even that it was bound by
 2 them. Ms. Barr's testimony also establishes that Fertility Connections always set its donor
 3 compensation levels based on market factors and its own ethical considerations and those of the
 4 clinics with which it worked and not based on any communications with Defendants.

5 **A. Dr. Singer's Regression Analyses Cannot Reliably Demonstrate Classwide**
 6 **Impact From Common Evidence Across a Nationwide Class.**

7 The Court need not delve into the particulars of Dr. Singer's regression analyses to
 8 conclude that his methodology is unreliable. Even crediting his approach and assuming that his
 9 models are properly specified, they apply only to Fertility Connections, a single donor agency out
 10 of more than 300 agencies and clinics in the United States. Dr. Singer's two regressions use
 11 Fertility Connections data for the period April 2005 to December 2008 and attempt to determine
 12 what effect the donor compensation provisions in the challenged Ethics Report had on the donor
 13 compensation levels the agency paid. Class Certification Report of Hal. J. Singer, Ph.D. ("Singer
 14 Rep.") ¶¶ 31, 34-42 (attached as Exhibit 7 to Dkt. #119). In one, Dr. Singer compares donor
 15 compensation paid by Fertility Connections for periods in which it was supposedly adhering to
 16 the compensation levels set forth in the challenged Ethics Report with donor compensation paid
 17 in periods during which it supposedly was not following those guidelines. *Id.* In the second, he
 18 compares the same data from Fertility Connections to data from Pacific Fertility Clinic, a clinic in
 19 San Francisco with an internal donor program, in an effort to determine how donor compensation
 20 at Fertility Connections "diverged from [Pacific Fertility Clinic's] compensation levels" when
 21 Fertility Connections supposedly "ceased to comply" with the compensation levels in the
 22 challenged Ethics Report. *Id.* ¶ 43.

23 Even assuming that Dr. Singer's models are accurately specified, they say nothing about
 24 impact and damage suffered by the putative class as a whole. Dr. Singer has admitted that his
 25 models are only "illustrative," *Id.* at 12-13, 24 (labeling analyses as "Illustrative Regressions,"
 26 "Illustrative Before-After Regression" and "Illustrative Difference-In-Differences Regressions");
 27 *id.* ¶¶ 38-39, 43-44 (substantive paragraphs referring to "illustrative before-after regression
 28 model" and "illustrative difference-in-differences" specification or model). He also admitted that

those illustrative regressions purport to measure impact and injury only among donors at Fertility Connections. Singer Dep. at 113:10-14 (Monts Decl. Ex. 1) (“But I have not yet been asked and I don’t feel comfortable yet at this point saying that I know that these experiences that I’ve looked at are, in fact, representative. No one’s asked me that yet.”)² He concedes that his models do not apply outside of the San Francisco area, much less to the entire purported nationwide class of donors for which Plaintiffs seek certification.³ To determine whether there was an impact on donors at any other clinic or agency, Dr. Singer would have to create new regression models that account for individual variation across each of the more than 300 clinics and agencies at which putative class members donated. In each such regression model Dr. Singer would need to include variables accounting for the unique factors affecting donor compensation levels at each individual clinic or agency. Moreover, even if one assumes that Dr. Singer could account for all of the relevant variables effecting donor compensation based on a smaller sampling of clinics and agencies, he would still have to make individualized inquiry at each clinic or agency to know which variables apply in any particular situation. When such individualized inquiry is required to establish impact, the expert’s model is not a reliable method for determining predominance. *See In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 503-05 (N.D. Cal. 2008) (denying class certification because of “plaintiffs’ failure to demonstrate a methodology for proving impact that is sufficiently common to the class”).

Dr. Singer’s handling of his Fertility Connections regressions amply demonstrates the problem. In his original models for Fertility Connections, he did not include any variable for the ethnicity of the donor. *See* Singer Rep. ¶ 38, Table 1 (listing variables included in the before-

² *See also* Singer Dep. at 114:5-10 (Monts Decl. Ex. 1) (“I just asked you about the illustrative regression, and as I understand it, you haven’t attempted to apply that analysis to the entire class at this stage of the game, the entire putative class? A: I have not.”).

³ *See* Singer Dep. at 140:24-141:9 (Monts Decl. Ex. 1) (“Q: Now, suppose that you had data from a clinic in Boston. I’m making up a city. Could you run the same regression with Fertility Connections and draw any conclusions from that? A: You might be able to. I don’t think it would be as good. I certainly wouldn’t be able to use this line, right? Q: Yeah. I mean, would you control, then, for the geographic differences? A: I think you would have to revisit that issue, yes.”).

1 after regression and showing no variable for ethnicity); *id.* ¶ 43 (showing variables for difference-
 2 in-differences regression and showing no variable for ethnicity). Indeed, Dr. Singer testified
 3 during his deposition that he had considered an ethnicity variable but determined that it was
 4 virtually impossible to control for ethnicity given the variety of ethnic backgrounds manifest in
 5 the Fertility Connections data.⁴ Yet Sherri Barr, the principal of Fertility Connections,
 6 subsequently stated in her declaration that ethnicity was a factor affecting the level of
 7 compensation at her agency at various times. Declaration of Sherri Barr (“Barr Decl.”) (Dkt.
 8 127) ¶ 4. Dr. Singer and the Plaintiffs, however, never bothered to ask Fertility Connections what
 9 factors actually drove the agency’s compensation decisions. Nevertheless, in light of Ms. Barr’s
 10 testimony, Dr. Singer revised his Fertility Connections regression and attempted to add a variable
 11 to his model to control for ethnicity. Reply Report of Hal J. Singer, Ph.D. in Further Support of
 12 Plaintiffs’ Motion to Certify Class (“Singer Reply”) ¶¶ 27-30 (attached as Exhibit 4 to Dkt.
 13 #134). In other words, *after individualized inquiry*, Dr. Singer was forced to modify his
 14 regression to take into account unique factors affecting the compensation of donors at Fertility
 15 Connections. This example puts in stark relief both the unreliability of Dr. Singer’s methodology,
 16 and the fact that individualized inquiry is necessary to determine whether any putative plaintiff
 17 class members suffered impact.

18 Dr. Singer’s attempted adjustment to his analysis based on the factors that Ms. Barr
 19 testified were relevant to Fertility Connections would need to be repeated for every clinic or
 20 agency across the nation based on the factors affecting compensation at that particular agency or
 21 clinic. Some of those factors may well be the same as the factors affecting compensation at
 22 Fertility Connections. But others may be different, and the mix of relevant factors affecting

23
 24 ⁴ Singer Dep. at 71:7-23 (Monts Decl. Ex. 1) (“Q: Let me just ask, and this is a data question
 25 since you’ll be far more familiar with it than I am, there was not a specific ethnicity attributed to
 26 each and every donor? A: There was, but the donor’s mother and father. Q: It was both? A:
 27 Yes. And it was almost – it was too granular, in a sense, and I don’t have the ability or it wasn’t
 28 obvious to me how to shrink it down to something that was more manageable. Q: Do you have
 any belief about whether ethnicity would be important to the recipient? A: Oh, sure, it could. Q:
 And how about race, if we draw that as something different from ethnicity? A: Sure, race could
 matter.”).

donor compensation at one clinic or agency may or may not be the same as that affecting donor compensation at any other clinic or agency. Dr. Singer's original regressions control for such variables as hair color, eye color and educational achievement, but do not include other potentially relevant factors – height, athletic skill, musical talent and geographic location of the donor and the agency or clinic obtaining the donation, for example – that might affect the selection of any particular donor and the compensation paid to her. Indeed, Dr. Singer concedes that such variables might very well affect donor compensation⁵ and that some variables *cannot* be controlled for using a regression model.⁶ Dr. Singer claims to control for certain factors within his analysis of the Fertility Connections data, but again provides no basis for applying that same analysis or controlling for the same variables across all putative class members at all clinics and agencies nationwide.

The need for individualized inquiry at different clinics and donor agencies belies any notion that Dr. Singer's methodology can demonstrate common impact across a nationwide class based on common proof applicable to all class members. This clinic-by-clinic/agency-by-agency approach is the antithesis of determining common impact across putative class members “in one stroke.” *Dukes*, 131 S. Ct. at 2551. To satisfy *Daubert*'s relevancy requirement, the methodology chosen by the expert must be suitable to establishing the fact in question. *See In re Photochromic Lens Antitrust Litig.*, 2014 WL 1338605, at *23 (M.D. Fla. Apr. 3, 2014) (“Experts are required to demonstrate their methodology is capable of using common evidence, yet Dr. Singer does not even attempt to do so for an overwhelming majority of the class.”). At the class

⁵ Singer Dep. at 69:20-24 (Monts Decl. Ex. 1) (“And you know, I recognize that these eggs are not homogenous. They can vary. So that's why it is important to control for them in an analysis when you're trying to isolate the effect of the challenged conduct.”); Singer Dep. at 68:12-19 (Monts Decl. Ex. 1) (“Q: You've listed some here, hair color, eye color, body mass index. Let's say someone's judgment about the physical beauty or appearance of someone, SAT scores, athletic talent, musical talent. Would you expect those to play a role in the but-for world in determining the price of donor compensation? A: They could; they could.”).

⁶ Singer Dep. at 69:9-15 (Monts Decl. Ex. 1) (“Q: Okay. So were there any recorded characteristics that said this is a particularly beautiful donor? That often seems to be in the eye of the beholder. A: Right. So you don't go by something as subjective – that would be hard to measure and create a variable.”).

1 certification stage, the issue is whether Plaintiffs can demonstrate from common evidence that the
 2 compensation provisions of the challenged Ethics Report had an effect on members of a single
 3 class of egg donors *across the United States* for an approximately seven-year period. Dr. Singer
 4 appropriately concedes that his regression cannot do so.

5 Moreover, even if the individualized inquiry required by Dr. Singer’s model did not make
 6 his method unreliable, discovery has now closed and Dr. Singer and the Plaintiffs have not
 7 adduced documents, data or testimony necessary to undertake the individualized inquiry his
 8 model requires. In his report, Dr. Singer said that he could apply his “illustrative” regression
 9 more broadly “to larger and/or more diverse data sets from additional entities as they become
 10 available.” Singer Rep. ¶ 29. He opines that he is looking for experiments in which a clinic or
 11 agency “changes status” or “was in and then wanted out” of SART. Singer Dep. 83:13-23,
 12 146:21-147:25 (Monts Decl. Ex. 1). To that end, he testified that he believed that there were 50
 13 agencies that “were members at one point and then asked to be removed.” *Id.* (Monts Decl. Ex.
 14 1) But the record is barren of evidence supporting that assertion, and Dr. Singer did not “have the
 15 price data” for these agencies at the time of his deposition. *Id.* at 84:3-12 (Monts Decl. Ex. 1).
 16 Discovery is now closed, and Dr. Singer and the Plaintiffs still do not have any data – other than
 17 the Fertility Connections data – that would permit them to evaluate impact or to even evaluate
 18 whether removal is even related to the Ethics Report at issue. *Id.* (Monts Decl. Ex. 1). In short,
 19 no facts suggest that the analysis used for donors at Fertility Connections can be replicated at any
 20 other clinic or donor agency anywhere in the United States. By choosing an approach requiring
 21 individual analysis of agency and clinic data, Dr. Singer has undermined his own conclusions.
 22 Even accepting his regressions as valid for donors at Fertility Connections, they have no
 23 application to any other clinic or agency.

24 Compounding that problem, Dr. Singer admits that his regressions do not actually
 25 calculate impact or damages for a nationwide class of donors. *Id.* at 113:15:24 (Monts Decl. Ex.
 26 1) (“What I’ve been asked to do was design basically a method – well, asked could one design a
 27 method for showing the impact and would it involve any kind of individualized methods or
 28 evidence. And that I feel comfortable saying today. Q: But as to whether or not it actually

1 would show that, you don't know? A: I see that – yeah, I don't know it, and I - well, I don't
 2 know it today. I will leave it at that.”). Indeed, during his deposition, he testified that he had not
 3 determined impact across the entire class and did not have the data to calculate aggregate
 4 damages for the class. *Id.* (Monts Decl. Ex. 1); *see also id.* at 84:3-12 (Monts Decl. Ex. 1).

5 Such a hypothetical, speculative approach is unreliable. At class certification, Plaintiffs
 6 may not merely promise to produce evidence at some point showing classwide impact and
 7 aggregate damages. *Photochromic Lens*, 2014 WL 1338605, at *23 (expert's theoretical
 8 assertions insufficient; referring to opinion of Dr. Singer). Instead, they “‘must affirmatively
 9 demonstrate . . . compliance’ with Rule 23.” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432
 10 (2013) (quoting *Dukes*, 131 S. Ct. at 2551-52). Here, Dr. Singer's opinions offer no affirmative
 11 demonstration of anything but rather a tautology – namely, if he can get enough data and has
 12 enough time, he can show impact on class members and calculate aggregated damages using
 13 common econometric tools. *See, e.g.*, Singer Report ¶¶ 25-26 (noting that “[e]conometric models
 14 *can be used* to demonstrate common impact” and that applied in this case, “an econometric model
 15 would measure variation in the per-cycle compensation received for Donor Services as a function
 16 of individual donor characteristics, as well as a variable capturing the effect of the Challenged
 17 Conduct”) (emphasis added). But that assertion, which could be found in any common
 18 econometric textbook, says nothing about whether Dr. Singer's illustrative models are actually
 19 capable of determining whether any members of the purported class suffered impact, and they
 20 cannot.

21 For Dr. Singer's opinions to be admissible, Plaintiffs “must explain the expert's
 22 methodology and demonstrate in some objectively verifiable way that the expert has both chosen
 23 a reliable . . . method and followed it faithfully.” *Pecover*, 2010 WL 8742757, at *4 (applying
 24 *Daubert* principles to class certification) (quoting *Daubert v. Merrill Dow Pharms., Inc.*, 43 F.3d
 25 1311, 1317 (9th Cir. 1995) (*Daubert II*) . Yet there is nothing objectively verifiable about Dr.
 26 Singer's analyses at all. To the extent they offer illustrations, they apply only to a single donor
 27 agency. As noted above, Dr. Singer himself does not even claim that his Fertility Connections
 28 regressions can be applied reliably to any other clinic or agency. Instead, he opines only that, if

1 certain data exist and are obtainable, he could create additional analyses that apply to donors at
 2 other clinics and agencies. But such data would not be “common” to the class, and the data are
 3 not in the record in any event. Discovery is now closed, and nothing in the record suggests that
 4 Dr. Singer’s analysis could apply to any donors other than those at Fertility Connections. Dr.
 5 Singer’s model simply does not provide a reliable methodology for determining the impact of the
 6 compensation provisions of the challenged Ethical Report on all class members of the purported
 7 nationwide class, or for calculating classwide damages, using evidence common to the class.

8 For an expert’s opinion to be reliable and admissible, there must some indication, other
 9 than the expert’s assertion that he should be trusted, that the methodology chosen is, in fact,
 10 applicable to all absent class members.⁷ Here, not only is there no evidence suggesting such
 11 broad applicability, there is an explicit admission that the methodology has not and cannot be
 12 applied to putative class members other than those who donated through Fertility Connections.
 13 Dr. Singer’s regressions and the opinions based on them, therefore, should be excluded.

14 **B. Dr. Singer’s Regressions Rest on Assumptions That Are Contrary to the**
 15 **Undisputed Facts.**

16 To be “relevant” and thus “helpful” under Rule 702, the expert must apply a reliable
 17 methodology faithfully to the facts of record. *Daubert*, 509 U.S. at 592-93. Dr. Singer’s opinions
 18 also fail to meet that requirement because his Fertility Connections regression does not even
 19 withstand scrutiny as applied to the facts of donors at that particular agency.

20 Dr. Singer testified that having a period in which Fertility Connections was following the
 21 compensation provisions in the challenged Ethics Report and one in which it was not was crucial
 22 to his regressions because that would allow him isolate the effects of the allegedly unlawful
 23 agreement on donor compensation. Singer at 83:1-3 (Monts Decl. Ex. 1) (“[W]e need to exploit
 24 an experiment in which someone changes status.”). Dr. Singer apparently believed that he found

25 _____
 26 ⁷ The Court need not decide whether an expert’s model must actually show injury to each absent
 27 class member at the class stage, although there is support for that position. *Bell Atl. Corp.*, 339
 28 F.3d at 302. At a minimum, the method for showing common impact must be *applicable* to all
 absent members and, when applied to any individual class member, must be able to show whether
 that class member has suffered any injury or not. Dr. Singer’s models fail that test.

1 such a period between March 2006 and December 2008 based solely on a letter that Fertility
 2 Connections sent to SART asking to be removed from the SART website. *See* Singer Dep. at
 3 31:20-23 (Mons Decl. Ex. 1) (determining whether donor agency is adhering to compensation
 4 provisions of the Ethics Rule by “whether there was a letter or some other statement expressing a
 5 desire or request to be removed as a listed agency on the SART web site”). Indeed, Dr. Singer
 6 simply assumes, with no basis, that Fertility Connections severed ties with SART because of a
 7 desire to “escap[e] the constraint” of the Ethics Report. *Id.* at 39:24-40:20 (Mons Decl. Ex. 1)
 8 (“sitting here, it’s hard for me to think of other reasons . . . as to why someone would ask to
 9 quit”). He never verified this assumption, however, with anyone from Fertility Connections or
 10 the evidence in the record. *Id.* at 34:17-24 (Mons Decl. Ex. 1). And his assumption contradicts
 11 the undisputed record facts.

12 Fertility Connection’s principal, Sherri Barr, testified that her agency never changed its
 13 donor compensation levels based on any conversations with SART or ASRM and that at no time
 14 did any correspondence with SART, much less the removal from SART’s website, have any
 15 effect on the agency’s donor compensation decisions. Barr Decl. ¶¶ 7-10. That testimony is
 16 un rebutted. Indeed, Ms. Barr’s declaration belies any notion that Fertility Connections was ever
 17 out of “compliance” or considered itself as having escaped the “constraint” of the compensation
 18 provisions in the challenged Ethics Report. As Ms. Barr testified, Fertility Connections always
 19 considered the compensation levels described in the challenged Ethics Report as a useful
 20 recommendation but not one by which it was bound. *Id.* ¶ 9. Fertility Connections set donor
 21 compensation based on its own ethical determinations and guidelines from clinics it served and
 22 on market factors. *Id.* ¶¶ 4, 6, 8-9. Thus, Dr. Singer’s regressions assume a period in which
 23 Fertility Connections actively declined to adhere to the compensation provisions of the Ethics
 24 Report that never existed. While Dr. Singer may call his analysis a “before/after” analysis, there
 25 is no before and no after.

26 Ms. Barr’s assertions are confirmed by Fertility Connections’ data, which further
 27 demonstrates the lack of correspondence between the assumptions built into Dr. Singer’s
 28 regressions, the undisputed facts, and Plaintiffs’ theory of the case. Plaintiffs’ complaint alleges

1 that the unlawful conduct at issue is an agreement among clinics and agency setting a “maximum
 2 price” at either \$5,000 or \$10,000. *See* Comp. ¶¶ 60-63. Yet throughout the entire period
 3 covered by Dr. Singer’s regressions, Fertility Connections’ payments to donors *always* exceeded
 4 \$5,000 and were *always* below \$10,000. Therefore, depending on whatever theory Plaintiffs’
 5 ultimately adopt, *all* of Fertility Connections’ payments were either “compliant” or “non-
 6 compliant” with the Ethics Report. For example, if Plaintiffs’ claim that the “maximum price” set
 7 by the challenged Ethics Report is \$5,000, then Fertility Connections was never in “compliance.”
 8 Conversely, if Plaintiffs claim that the “maximum price” is \$10,000, then at no time during the
 9 period Dr. Singer analyzed was Fertility Connections out of “compliance.” In short, there is no
 10 point at which Fertility Connections “change[d] status” with respect to the Ethics Report – what
 11 Dr. Singer described as necessary in order for his regression to demonstrate impact to donors at
 12 Fertility Connections. Singer Dep. at 83:1-5. (Monts Decl. Ex. 1). Accordingly, Dr. Singer’s
 13 regressions do not fit the facts of the case and are therefore not relevant to the class certification
 14 inquiry. His opinions based on those regressions must be excluded.

15 **II. DR. SINGER’S “RIGID PRICING STRUCTURE” ANALYSIS DOES NOT** 16 **SALVAGE HIS OPINIONS.**

17 Aside from his regression analyses, Dr. Singer opines that clinics and agencies maintain a
 18 “rigid pricing structure” for donor compensation. This analysis does not salvage Dr. Singer’s
 19 opinions and is likewise inadmissible under both the reliability and relevance prongs of *Daubert*.
 20 The “rigid pricing structure analysis” is unreliable because it rests on no discernible application of
 21 any recognized economic principle. It is also irrelevant because it does not square with the
 22 undisputed facts of the case. Dr. Singer concedes that the “rigid pricing structure” analysis does
 23 not show impact across all purported class members. Singer Dep. at 100:12-21 (Monts Decl. Ex.
 24 1). Further, rather than using actual donor compensation payments to determine whether a “rigid
 25 pricing structure” exists, Dr. Singer relies largely on advertised compensation levels or a range of
 26 advertised compensation levels at various clinics and agencies. A review of actual compensation
 27 levels, however, shows wide variation in payments to donors both within individual clinics and
 28 agencies and across clinics and agencies. Dr. Singer’s opinions based on his “rigid pricing

1 structure” analysis, therefore, are inadmissible.

2 **A. Dr. Singer’s Conclusion That a “Rigid Pricing Structure” Exists Applies No**
 3 **Recognized Economic Principle.**

4 Defendants do not challenge Dr. Singer’s qualification as an economist. He has the
 5 education and training that qualify him to render expert opinions in the area of economics. But in
 6 order to render admissible opinions, he must apply accepted economic techniques and principles
 7 to reach his conclusions. *Daubert*, 509 U.S. at 590 (“But, in order to qualify as ‘scientific
 8 knowledge,’ an inference or assertion must be derived by the scientific method. Proposed
 9 testimony must be supported by appropriate validation—*i.e.*, “good grounds,” based on what is
 10 known.”); *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999) (“A supremely qualified
 11 expert cannot waltz into the courtroom and render opinions unless those opinions are based upon
 12 some recognized scientific method and are reliable and relevant under the test set forth by the
 13 Supreme Court in *Daubert*.”). In short, to offer an admissible opinion, an expert’s methodology
 14 must apply the tools of his or her expertise and training. In the context of an antitrust case, an
 15 expert economist must apply economic analysis to reach a conclusion. Dr. Singer’s “rigid pricing
 16 structure” conclusion does not meet that requirement.

17 Dr. Singer conducted his “rigid pricing structure” “analysis” by simply plotting agency
 18 and clinic donor compensation on a chart. The data plots were all over the map, varying from
 19 less than \$4,000 to more than \$16,000. Singer Rep. at Figure 1. Based on apparently nothing
 20 more than an “eyeball” test, however, Dr. Singer opined that the donor compensation rates at
 21 various clinics and agencies clustered visually within a specified range. *See* Report of Thomas
 22 McCarthy, Ph.D. (“McCarthy Rep.”) ¶ 61 (attached as Exhibit 19 to Dkt. #126) (Singer “rigid
 23 pricing structure” analysis “appears to be based on a visual inspection of the graph and does not
 24 appear to have any basis in analytic fact at all”). As such, he concludes that a “rigid price
 25 structure” exists. This amorphous and unscientific methodology allows Dr. Singer to conclude
 26 that a “rigid pricing structure” exists even when there are significant variations in compensation
 27 both within a particular clinic or agency and across multiple clinics and agencies.

28 Whatever it may be called, this methodology is neither “scientific” nor “economic,” and it

certainly does not “help the trier of fact” for an economist to make a visual inspection of data that the Court is perfectly capable of making for itself. Fed. R. Evid.702. Dr. Singer’s visual inspection is malleable and can be altered to fit virtually any factual scenario or support virtually any conclusion. It appears to contain no fixed definitions or parameters and rest on no accepted or standard testing procedures. Perhaps most important, Dr. Singer applies no discernible economic principles to connect this supposed “rigid pricing structure” to his conclusion that adherence to the compensation levels in the Ethics Report will affect donor compensation levels across all members of the purported plaintiff class. As Dr. Singer concedes, there is no evidence that donor compensation moves in parallel *across* clinics or agencies pursuant to some “structure” – rigid or not. Singer Dep. at 92:8-13 (Monts Decl. Ex. 1) (“So you shouldn’t take rigid pricing structure to mean identical pricing across clinics. It’s that within a clinic, there’s a price, and that’s basically what you’re going to get.”). In short, Dr. Singer did not apply accepted principles of economics. Accordingly, his methodology is not reliable. His opinion on this point should be excluded as well.

B. Dr. Singer’s “Rigid Pricing Structure” Analysis Ignores Actual Compensation Data and Substantial Variation in Compensation Across Clinics and Agencies.

Dr. Singer rests his “rigid pricing structure” analysis on compensation data from approximately 30 clinics and agencies. Underscoring the malleability of the concept, in most cases, he uses list or advertised prices instead of *actual* compensation paid to various donors within those clinics and agencies. For example, with respect to Pacific Fertility Clinic, he uses “Agency Fee Schedules.” *See, e.g.*, Singer Rep. ¶¶ 17-19. Dr. Singer admitted that he did not talk to any of the clinics or agencies in his analysis to determine whether their actual transaction prices deviated from list or advertised prices. Singer Dep. at 89:8-90:6 (Boston IVF) (Monts Decl. Ex. 1); 91:24-92:1 (IVF New Jersey) (Monts Decl. Ex. 1). With other clinics and agencies, he uses a minimum and maximum price range, rather than an actual compensation levels paid to donors. The actual data from those clinics, however, show that very few donors were paid at the advertised minimum or advertised maximum and that wide variation exists in actual payments.

1 With still other clinics, he applies the most common rate paid to donors, which amounts to a form
 2 of averaging and thus masks variations in payments to donors that are apparent from review of
 3 the actual transaction data. As Defendants' expert, Dr. Thomas McCarthy, noted in his report,
 4 there is wide variation in actual compensation paid to donors across clinics and across the nation.
 5 *See McCarthy Rep.* ¶ 61. While most of the observations in Dr. Singer's data fall within the
 6 \$5,000-\$10,000 range, the majority of observations are actually different from \$5,000 and
 7 \$10,000, and fully 17 percent of the observations fall outside the range altogether. *Id.* Far from
 8 showing a "rigid pricing structure," the actual compensation data show precisely the opposite.

9 The "rigid pricing structure" analysis suffers from two other fatal factual infirmities.
 10 Although Dr. Singer's report asserts that the "rigid pricing structure" could be used to show
 11 common impact from the Ethics Report across all purported class members, he abandoned that
 12 contention during his deposition. He testified that the "rigid pricing structure" exists only *within*
 13 clinics and agencies, not *across* clinics and agencies. Singer Dep. at 92:8-13 (Monts Decl. Ex. 1).
 14 Therefore, at bottom, the "rigid pricing structure" analysis amounts to nothing more than an
 15 unremarkable proposition that clinics and agencies – like any other purchaser of any product or
 16 service – only have a single "average" price or a single "maximum" and "minimum" price. Such
 17 analysis is not the stuff of reliable expert testimony.

18 Finally, Dr. Singer conceded that the "rigid pricing structure" has no bearing no whether
 19 there is impact across all purported class members:

20 Q: Isn't this consistent with also competitive pricing? Don't you see competitive
 21 prices cluster at certain levels?

22 A: It very well may be. So that means that in competitive markets, you might have
 23 pricing structures. This isn't proof of anticompetitive effects. *This isn't proof of*
 24 *impact.*

25 Singer Dep. at 100:13-19 (Monts Decl. Ex. 1) (emphasis added). If the "rigid pricing structure"
 26 analysis is not "proof of impact," as Dr. Singer has admitted, then it has no relevance to the
 27 inquiries for which his opinions are offered. It should be excluded.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court exclude the expert opinions of Dr. Hal J. Singer offered on Plaintiffs' class certification motion.

Respectfully submitted,

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